October 1, 2008

Commissioner Phil Giudice
Massachusetts Division of Energy Resources
100 Cambridge Street #1020
Boston, MA 02114

RE: RPS Imports Feasibility Study

Dear Commissioner Giudice:

Constellation Energy Commodities Group ("CCG") and Constellation NewEnergy ("CNE") (collectively "Constellation") welcomes the opportunity to provide comments in the RPS Imports Feasibility Study.

CCG is a wholesale supplier of electric power to many of New England's electric utilities in connection with either their standard offer or default service obligations. CNE is a licensed retail supplier in 17 states, including Massachusetts, and two Canadian provinces. CNE currently provides over 15,500 MW of electrical supply directly to businesses throughout the country for their own use, including hundreds of Commercial and Industrial customers in Massachusetts. Both companies are subsidiaries of Constellation Energy Group, Inc., headquartered in Baltimore, Maryland, which also owns Baltimore Gas and Electric Company, a regulated utility. In addition, Constellation is an active purchaser of Renewable Energy Credits and accompanying power from renewable generators both inside and outside of ISO-NE. We also are a provider of renewable energy products throughout the country.

Pursuant to the recently enacted Green Communities Act (Chapter 169 of the Acts of 2008) (the "Act"), the Massachusetts Division of Energy Resources ("DOER") has been directed to "assess the feasibility of implementing subsections (c) and (e) of (Section 105) and report its findings along with proposed regulations for implementing these subsections in accordance with section 12 of chapter 25A, on or before November 1, 2008." The DOER has also stated on its website: "If DOER finds that their implementation is not feasible, they will not go into effect."

Subsection (c) requires that in order to qualify under the MA RPS, external renewable generators must "commit the renewable generating source as a committed capacity resource for the applicable annual period." Subsection (e), the so-called "netting" provision, states that "the renewable portfolio standard credit applicable to the eligible renewable energy as determined under subsection (d) shall be reduced by any exports of energy from the ISO-NE control area made by the person seeking renewable portfolio credit for such renewable energy or any affiliate of such person, or any other person under contract with such person to export energy from the ISO-NE control area and deliver such energy directly or indirectly to such person."

As a general matter Constellation believes, that these anti-import restrictions result in bad public policy because they are parochial, a form of economic protectionism, would reduce the size and breadth of renewable energy markets, would likely cause retaliation by neighboring control areas and would result in higher costs to consumers.

Constellation believes the anti-import restrictions are both practically infeasible from a logistical and operational standpoint and legally infeasible as they would constitute a violation of the Untied States Constitution's Commerce Clause.

Initially, one must determine what level of discretion the DOER has in determining whether these restrictions are "feasible." As a general matter, regulatory bodies always have discretion in implementing statutes. In this instance, however, the DOER has greater discretion still. In this instance, the Legislature has specifically directed the DOER to determine whether or not these restrictions are feasible. Therefore the Legislature has granted the DOER more than the usual deference bestowed upon regulatory bodies to implement their mandates.

The word "feasible" is defined as follows: 1. capable of being done or carried out; practicable; possible (a feasible scheme) 2. within reason; likely; probable (a feasible story) 3. capable of being used or dealt with successfully; suitable (land feasible for cultivation) (Webster's New World Dictionary of the American Language, Second College Edition © 1974). So, the DOER has to determine whether or not these import restrictions are practicable, within reason, capable of being used or dealt with successfully. The DOER is not limited to a determination of simply whether the restrictions can be implemented, no matter the cost, policy implications, or impact upon external renewable generators.

The question that DOER should be contemplating is whether or not the import restrictions are feasible to implement while still allowing external generators to import into New England. If the answer is no then the restrictions are not feasible. Had the Legislature wished to prevent renewable imports altogether into New England they would have written the Legislation to simply state as much. They would not have codified the existing ISO-NE rules that allow for imports ((*see* subsections (a), (b), and (d) of Section 105)) and added two provisions to them that would deny imports. Therefore, if the practical effect of implementing subsections (c) and (e) is to prevent the import of renewables into ISO-NE the DOER should find they are infeasible (not practicable) and not implement them.

The requirement that external renewable generators be designated as a "committed capacity resource" in ISO-NE is impracticable for two reasons. First, committed capacity resources are obligated to bid in the day-ahead market and are expected to be available at that level in real time. If they are not then they are subject to significant imbalance penalties. Wind generators do not know a day ahead how much capacity they can produce. As a result they cannot participate in the day-ahead market. Internal renewable generators, on the other hand, are allowed to de-list, and therefore engage in energy markets without penalty. Second, under ISO-NE rules for the Forward Capacity Market ("FCM") external renewable generators would be placed at a significant disadvantage in relation to in-region renewable generators. In the FCM (post June 1, 2010) a capacity resource must qualify for the auction, a process that begins about four years prior to delivery of capacity. The resource must thereafter bid into the FCM auction three years prior to delivery of capacity. Pursuant to subsection (c), external resources are required to include capacity in contracts after January 2009 in order to qualify for RECs – an impossibility. In other words, forcing a capacity requirement on imports for the next three years would require customers to pay for capacity in order to qualify for RECs, but they would not benefit from that capacity because they would not have qualified as capacity in the FCA. Therefore, the practical result of the requirement to be designated a committed capacity resource would be the elimination of the import of wind power. This is not an end result that the Legislature envisioned.

The "netting" provision is also impracticable to implement. It would be extremely difficult to monitor and govern. How would DOER monitor compliance with this restriction? Companies like Constellation import and export both renewable and brown power all the time. At a minimum any effort to monitor myriad sales between control areas would require extensive and expensive revisions to the NEPOOL GIS system, all at a cost that would go directly to Massachusetts consumers, as this is a Massachusetts restriction. Further, the practical effect of this restriction could be that Constellation (and companies like it) would simply

abandon the external renewable market. In all likelihood, Constellation would not step up and enter into the next long-term contracts with the next wave of external renewable generators. With fewer players in the market and renewable imports being effectively barred from New England the end result would be higher prices for renewable power and higher prices for consumers.

Finally, the ostensible rationale for the netting provision is to prevent "green washing." As became clear at the stakeholder process on September 23 at the DOER, there is absolutely no evidence that anyone is engaging in such a practice. Therefore, the netting provision is a "cure" to a problem that does not exist.

To summarize, these two anti-import restrictions are practically and logistically infeasible and would result in the elimination of imports from external renewable generators. While there may be some in-region stakeholders who seek such an outcome this would result in a significant decrease in the amount of renewable generation in New England which would increase the cost to consumers. Constellation does not believe that the Legislature intended such an outcome.

The practical infeasibility of the anti-import restrictions notwithstanding, they are also legally infeasible because they violate the Commerce Clause of the U.S. Constitution.

As previously discussed, resources which otherwise qualify pursuant to ISO-NE rules face two additional restrictions that have been placed on renewable imports pursuant to the Act. First, the Act states that in order for a renewable generator outside of the ISO-NE control area to qualify as renewable power in Massachusetts it must "commit the renewable generating source as a committed capacity resource for the applicable annual period." Section 105(c)(3). Second, the Act requires that "the renewable portfolio standard credit applicable to the eligible renewable energy as determined under subsection (d) shall be reduced

by any exports of energy from the ISO-NE control area made by the person seeking renewable portfolio credit for such renewable energy or any affiliate of such person, or any other person under contract with such person to export energy from the ISO-NE control area and deliver such energy directly or indirectly to such person. Section 105 (e).

The anti-import restrictions ignore two irrefutable axioms of the electricity markets. First, electricity "follows the laws of physics, not the laws of contracts." This is the case because it is the nature of electricity to follow the path of least electrical resistance and because electricity transmission networks have a high degree of interconnectedness. Thus, tracing or directing power flows between specific electric generators and consumers is nearly impossible.

The second fundamental aspect overlooked by the anti-import restrictions is that the renewable attributes of renewable energy need not be intertwined and encumbered by the physical constraints of the transmission system. Thus, renewable aspects are properly severable and separate from the energy itself. Yet, the anti-import restrictions unnecessarily and inappropriately link them.

Given this background, the proposed anti-import restrictions place an impermissible and unnecessary burden on otherwise eligible renewable energy from outside of the ISO-NE control area. Subsection 105(c) requires external generators to "commit the renewable generating source as a committed capacity resource for the applicable annual period." ISO-NE rules require Committed Capacity Resources to bid in the day-ahead market and they are exposed to significant imbalance penalties in real time if they do not deliver. Intermittent generators, wind as an example, cannot know on a day-ahead basis how much capacity they can produce and therefore cannot reasonably comply with this provision—a provision not applicable to similar resources within ISO-NE. In-region intermittent resources are not required to become Committed Capacity Resources. In-region resources are free to de-list and participate in the energy

markets without penalty. Therefore, the practical result is that this restriction prohibits the import of wind power. This is a clear disparate and discriminatory treatment for external generators.

Section 105(e) also places unfair burdens on the renewable market. This section would require importers of renewable energy into New England to "net" the associated RECs from these imports against their energy exports. This provision acts as a further barrier to renewable imports: (1) it creates great disincentives and cost burdens for companies to import renewable energy where they may have other business affiliates that may, in the normal course of business, export power out of ISO-NE; (2) it ignores the severable aspects of the REC and, most offensively; (3) it places no equivalent burden on "homegrown" renewable resources.

The U.S. Constitution reserves to the Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, § 8). Conversely, individual states are limited in their ability to legislate these reserved federal matters. The "Dormant" Commerce Clause is not an express provision of the Constitution; however it is a derivative doctrine that has long been applied by the courts. It is fundamentally a rule against discrimination that is applied to prohibit state or municipal laws whose object is local economic protectionism. *See* The Federalist No. 22, pp. 143-145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362-363 (G. Hunt ed. 1901). Recently, the Supreme Court summarized the rule and its application:

> The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3. Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.

> To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity," which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.

*See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 167 L. Ed. 2d 655, 664-65 (U.S. 2007) (internal citations omitted).

Taken together, the anti-import restrictions cannot be reasonably viewed as anything other than an impermissible attempt to retain the economic benefits of renewable energy within the Commonwealth's and/or the ISO-NE's borders despite the interstate nature of power flows and the severable nature of the renewable aspects of renewable resources.

Since Massachusetts represents about half of New England's electric load, any provision that unfairly advantages ISO-NE regional resources necessarily advantages Massachusetts resources over renewable competitors from states outside of ISO-NE. Thus, these "regional" anti-import restrictions are no more than an "oblique proxy" for otherwise prohibited in-state sales and consumption requirements. *See Endrud,*45 Harvard L. Rev. at 272. Therefore, implementation of these provisions would unnecessarily burden out-of-state renewable resources regarding their eligibility under the Act, and clearly run afoul of the commerce clause. *See*, *e.g., id.*; *Wyoming v. Oklahoma*, 502 U.S. 347 (1992) (requiring use of indigenous fuel resources for in-state electricity production is unconstitutional); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (Ohio income tax credit limited to in-state ethanol producers is unconstitutional); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995) (Illinois preference for use of Illinois coal while satisfying Clear Air Act Amendment requirements unconstitutional) (emphasis added); Ferrey, Steven,

*Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 NYU Environmental Law Journal 507, 583 (2004); Nathan E. Endrud, Note, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 Harvard L. Rev. 265-74 (2008).

Historically, courts have applied one of two general tests in evaluating potential violations of the dormant Commerce Clause:

(1) The *Strict Scrutiny Test* has been applied when a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests. In this instance, the Court has generally struck down the statute without further inquiry. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 390 (1994); *Wyoming v. Oklahoma*, 502 U.S. 347, 454-55 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

(2) Under the balancing, or "*Pike Test*," when a state law even-handedly regulates to effectuate a legitimate local public interest that has only "incidental" effects on interstate commerce, the courts will uphold it unless the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *See Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

In this instance, the proposed anti-import restrictions exhibit **both** aspects, either of which alone, would likely trigger the *Strict Scrutiny Test.* They directly regulate and discriminate against interstate commerce and their effect is to favor in-state economic interests over out-of-state interests. Thus, they violate the Commerce Clause and cannot be considered legally "feasible".

In conclusion, these anti-import restrictions are both practically and legally infeasible. They would eliminate the import of external intermittent renewable resources and raise costs to consumers. In addition, they would constitute a violation of the Commerce Clause of the United States Constitution. The DOER should use its considerable discretion in this matter to determine that these anti-import restrictions are infeasible.

Sincerely,

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